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Clerk

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Brf. of Guthrie, Mayes, Fentress & Dickinson for Appt.

MISSISSIPPI TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 4, 1900.

No. 328.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant,*

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For the appellant.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

WASHINGTON, October Term, 1899

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 320.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant,*

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

This appeal presents for review a final decree of the Circuit Court of the United States for the Southern District of Mississippi (record, p. 56) which dismissed the bill of complaint for want of jurisdiction. The appeal was prayed and allowed under section 5 of the act of March 3, 1891, (*id.*, pp. 56, 58), and the judge holding the circuit court certified at length during the same term as to the issues and the proceedings in that court, the certificate concluding as follows:

> "Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the ground hereinbefore stated, namely:
>
> "1. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no proper Federal question.
>
> "2. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States" (record, pp. 62, 63).

Motions in this court to dismiss or affirm were submitted on November 6, 1899, and the decision postponed to the hearing on the merits.

So far as the present appeal is concerned, the case presents in substance the same questions of jurisdiction here and below as are involved in Nos. 318 and 319, although the contract claimed to be impaired differs from that in question in No. 318 in that it here provides for an appropriation of taxes to the payment of construction debt instead of an exemption (as in Nos. 244 and 319). Jurisdiction in the court below is not claimed by reason of diversity of citizenship, for the case, like Nos. 318 and 319, is one arising under the contract clause of the Federal Constitution. Counsel for the appellant desire to make a statement of the facts necessary to the consideration of the appeal, and to specify the errors complained of, and pray leave to refer to their brief filed in No. 318 for a discussion of the questions of law arising upon this record.

Statement of the case.

The bill was filed by the appellant, a corporation of Mississippi, against the state revenue agent of that state and the sheriffs of certain counties therein, all the defendants being citizens of Mississippi (record, pp. 1, 2), for the purpose of restraining the enforcement of taxes which, it was alleged, the defendants were attempting to enforce in violation of the contract clause of the Federal Constitution and of the Fourteenth Amendment. The bill alleged the incorporation by the Mississippi legislature of the Natchez and Jackson (afterwards Natchez, Jackson and Columbus) Railroad Company by act approved July 21, 1870 (*id.*, p. 2), and the passage of an act on August 8,

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1870, extending to that company the provisions of section 21 of the charter of the Mobile and Northwestern Railroad Company (record, p. 3), which are as follows (*id.*, p. 2):

> "SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional burdensome taxation upon the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes, upon receiving from the said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said company shall be subject; provided, however, that whenever the profits of said company shall enable said company to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector to be by him paid over as required by law."

The bill then alleged that the Natchez and Jackson Railroad Company, in reliance upon the provisions of section 21, expended large sums of money in the construction of its road and incurred a construction debt evidenced by bonds to the amount of $1,250,000. The provisions of section

21, so accepted by the Natchez and Jackson Railroad Company, are alleged to have constituted a contract between it and the State of Mississippi for the appropriation of the amount of the taxes to the payment of the construction debt, irrepealable for thirty years from August 8, 1870. For such purpose during each year a receipt for the taxes was required to be given to the railroad company upon proof of the payment of the amount of the taxes upon construction debt, as required by section 21 (record, p. 3).

The bill then stated the incorporation of the Memphis and Vicksburg Railroad Company in 1870 (*id.* p. 4); the act of March 3, 1882, authorizing consolidation between that company and the Mississippi Valley and Ship Island Railroad Company with all "the rights, privileges, immunities, franchises, etc., of the constituent companies" (*ib.*); and the amendatory act of 1884 by which the Memphis and Vicksburg Company was authorized to consolidate with any other railroad company and entitling the company so formed to the same rights, immunities, etc., given by the act of March 3, 1882. It was provided by section 5 of the act of 1882, that the provisions of section 21 of the Mobile and Northwestern charter should apply to any company consolidated under its provisions (*id.*, p. 5).

It was further set forth that under these acts the Memphis and Vicksburg Company and the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company were consolidated so as to become the Louisville, New Orleans and Texas Railway Company; that under the charters of its constituent companies this company constructed the railroad contemplated by those charters; that the consolidated company was organized in reliance upon

the provisions of the act of 1882, and that section 5 of the act of 1882 above referred to constituted a contract between the State of Mississippi and the consolidated company of the same effect as already alleged in respect of the Natchez and Jackson Railroad Company (*ib.*).

It was then alleged that in 1890 an act was passed authorizing the Natchez, Jackson and Columbus Company to sell its railroad, together with all its franchises, privileges and immunities; that in pursuance thereof it afterwards sold to the consolidated company (the L., N. O. & T. Co.) its railroad, with its franchises, privileges and immunities, subject to the aforesaid construction debt of $1,250,000, and that afterwards the consolidated company bought the bonds representing this construction debt for $890,000 of its own first mortgage bonds secured by a mortgage on its entire line of railroad, and used the $1,250,000 bonds of the Natchez, Jackson and Columbus Railroad Company as collateral security for its first and second mortgage bonds (*id.*, p. 6.)

The bill alleged that the complainant was incorporated by special act, and that on October 24, 1892, the L., N. O. and T. Company and the complainant, pursuant to the authority conferred by their respective charters, effected a consolidation whereby the former company was merged into the complainant company and "all of the property, real and personal, and all of the rights, franchises, privileges and immunities" of the former company, "including as part thereof all the property, real and personal, all of the rights, franchises, privileges and immunities that had been of the Natchez, Jackson and Columbus Railroad Company were transferred to and became the property, rights, privileges, franchises and immunities" of the

complainant; and that among the latter were the contract rights of the Natchez, Jackson and Columbus Company under said section 21, and the rights thereunder of the L., N. O. and T. Company as acquired by the sales and consolidations already set forth. It was stated that the complainant from the date of the consolidation had by virtue of these contracts been entitled to the "full exercise and enjoyment of the rights aforesaid by the legislation aforesaid contracted and conferred" (*id.*, pp. 6, 7).

It was shown that the state railroad commission had assessed the properties originally of the Natchez, Jackson and Columbus and of the Louisville, New Orleans and Texas Companies for the taxes of 1898 under the provisions of the chapter on revenue of the Mississippi Annotated Code of 1892; that the complainant had the right to pay said taxes by appropriation of the amount thereof under the provisions of section 21 and by making the necessary affidavit of the application in conformity with the statute; that it had so appropriated and applied the amounts of the taxes assessed against the respective properties, and had tendered the statutory affidavits; but that the defendants, the state revenue agent and the sheriffs of the various counties, disregarding the complainant's contract rights, and claiming the payment of the taxes in currency, were about to attempt the collection of the taxes imposed by multiplicity of suits and seizures (*id.*, pp. 7, 8, 9). It was alleged that the assessments thus made constituted a lien which had really been satisfied and discharged in full, and that the claims of the sheriffs and the state revenue agent constituted a continuing cloud upon the complainant's title; that the complainant could not pay the taxes under protest and then sue to recover them back without being subjected to a multiplicity of suits;

that in case of payment there was doubt as to the possibility of recovering the amounts paid to the different municipalities and counties, and that a suit against the state for that purpose would be unavailing (*id.*, p. 9).

It was expressly alleged that the threatened action of the defendants was to be taken under the revenue law passed in 1892, and under the act of 1894 defining the office and powers of the state revenue agent, both of which were subsequent to the contract conferring the right to appropriate the taxes to the payment of construction debt and in violation of section 10 of Article I. of the Constitution of the United States (*id.*, p. 10), and that sections 180 and 181 of the state constitution of 1890 were an impairment of the contract rights of the complainant (*id.*, p. 11).

The prayer of the bill was, in substance, for an injunction against the bringing of suits for the recovery of the taxes or seizing the defendant's property therefor, "or taking any steps or proceedings whatever for the collection and recovery of such taxes;" that it be adjudged that the complainant's property was under no liability for the taxes; and that the cloud arising from the assessment be removed from the title of the complainant to its property; and for further relief (*id.*, p. 13).

Shortly stated, the bill thus showed contracts between the state and the complainant and its assignor for the appropriation of taxes to the payment of construction debt; a vesting of these contract rights, together with the property affected by them, in the complainant; the expenditure of large amounts of money in reliance upon the contracts; subsequent state legislation which had the effect to impair the rights granted by the contracts; and facts justifying the interposition of a court of equity.

A restraining order having been granted, the same was

afterwards discharged by interlocutory order on the ground that the Circuit Court had no jurisdiction of the cause (*id.*, p. 51). An appeal from this order was dismissed by the Circuit Court of Appeals upon the ground that that court had no jurisdiction of the appeal (*id.*, p. 56). A final decree was then entered in the Circuit Court dismissing the bill (*ib.*), from which the complainant prayed an appeal to this court, assigning as error the action of the court in dismissing the bill for want of jurisdiction. The order granting the appeal stated: "This appeal is granted solely upon the question of jurisdiction, *this court having refused to assume jurisdiction in this cause*" (*id.*, p. 58).

The certificate has already been quoted. With the exception of the statement as to the question of jurisdiction based upon diverse citizenship, the proceedings in the Circuit Court and in the Circuit Court of Appeals were in all respects similar to those in Nos. 318 and 319. After the dismissal of the appeal by the Circuit Court of Appeals, but before the dismissal of the bill in the Circuit Court, the state revenue agent brought suit in the Circuit Court for Hinds County, Mississippi, and therein has recovered judgment against the appellant for the same taxes involved in this suit. An appeal has been taken from that judgment to the Supreme Court of Mississippi, and a *supersedeas* bond given. This appears from the affidavits of the appellee and of Mr. Edward Mayes on file. That appeal is still pending.

Specification of Errors.

The appellant specifies the following errors of the court below:

1. That the court erred in refusing to assume jurisdiction because of the alleged lack of a federal question.

2. That the court erred in refusing to assume jurisdiction on account of the Eleventh Amendment.

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I.

EFFECT OF THE SUBSEQUENT JUDGMENT IN THE STATE COURT.

The subsequent suit and judgment for the recovery of taxes here involved can have no effect upon the jurisdiction of this court to entertain the appeal nor upon the jurisdiction of the Circuit Court to entertain the suit. The proper course is for the Circuit Court to determine the validity of this defense when interposed by plea and established in evidence. *Huntington* v. *Laidley*, decided March 19, 1900.

II.

JURISDICTION OF THIS COURT.

The appeal involves only questions of the jurisdiction of the Circuit Court as a court of the United States and under the Federal Constitution and laws (*Huntington* v. *Laidley*, *supra*); and the practice followed was regular. *Shields* v. *Coleman*, 157 U. S. 168, 176; *Colvin* v. *Jacksonville*, 158 U. S. 456, 458.

III.

THE JURISDICTION OF THE CIRCUIT COURT.

The allegations of the bill of complaint make a case arising under the Federal Constitution and clearly within the jurisdiction conferred by the Act of August 13, 1888. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 562.

IV.

THE SUIT IS NOT ONE AGAINST A STATE.

Attempted legislation in conflict with the Federal Constitution affords no protection to the acts of so-called state officers assuming to act under the authority of such legislation (*Fitts* v. *McGhee*, 172 U. S. 516, 529; *Virginia Coupon Cases*, 114 U. S. 270, 288); and as to county

and municipal taxes which here also constituted the greater part of the amount in controversy, the Eleventh Amendment certainly does not apply. *Lincoln County* v. *Luning*, 133 U. S. 529.

Conclusion.

For these reasons and upon the authorities referred to in our brief in No. 318 the decree of the Circuit Court should be reversed and the cause remanded for further proceedings.

Washington, October Term, 1899.

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For the appellant.

JAMES FENTRESS,
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Of counsel.

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